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Nos. 87-2050, 88-90, 88-96

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION
GREATER PITTSBURGH CHAPTER, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE IN THIS CASE

Concerned Women for America ("CWA") is a national, non-profit membership organization with approximately 500,000 members. CWA's purpose is as follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values. . . .

We are concerned about the potential loss of religious freedom due to increased government intervention.

We would like to see the preservation of religious freedoms as provided in the United States Constitution.

Concerned Women for America supports the position of the petitioners that the public display of the menorah, the creche, and the Christmas tree on public and/or governmental premises is permitted under the Constitution. Concerned Women for America urges this Court to adopt the analysis of dissenting Judge Weiss, Petition for Certiorari at 25a, and to reverse the decision of the U.S. Court of Appeals for the Third Circuit.

SUMMARY OF ARGUMENT

The court below determined that displaying a creche, menorah, or Christmas tree on public property during the holiday seasons was unconstitutional. Its reasoning ignored this Court's precedent, history, and the intention of the Framers. None of those authorities prohibits display on public grounds of symbols with religious meaning. History, which mirrors intent, includes various forms of religious symbols and other religious expression by all three branches of government, much greater than the simple display of symbols currently under contention before this Court. Religious symbols are not limited to physical symbols such as menorahs, but include symbolic messages such as Thanksgiving proclamations, legislative chaplain's prayers, and expenditures with inherent symbolic meaning such as congressional grants to religious hospitals and Native American reservation churches.

The intent of the Framers was not to exclude religion wholly and rigidly from our public occasions. Excising

religion from our public commemorations is not only not required by the Constitution, but runs contrary to this Court's instructions that government should "accommodate the public service to [this Nation's] spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). A basic part of those needs is public and private display of our religious heritage along with other cultural legacies.

If this Court should find that these displays are unconstitutional, then it will inevitably invite turbulent litigation throughout the nation concerning a host of governmental practices and national monuments that reflect our religious heritage. The historical and constitutional foundation of this country rests on the premise that religion and its multifarious forms of symbolic expression should be accommodated rather than expunged.

ARGUMENT

I. THE HISTORICAL EVIDENCE SHOWS THAT THE FIRST AMENDMENT WAS NOT INTENDED TO CENSOR GOVERNMENTAL ACKNOWLEDGMENT OF THE RELIGIOUS PART OF OUR NATION'S HERITAGE.

The Court has long recognized that the Establishment Clause does not restrict governmental recognition of the nation's "religious heritage." *Zorach* v. *Clauson*, *supra* at 312-13 (1952). Much of that permissable acknowledgment of "religious heritage" involved religious symbols and other public religious expression that is far more questionable than the tree, creche, and menorah in this case.

A. The Climate Of Our Revolutionary Government Prior To The Framing Of The First Amendment Was One Of Strong Governmental Recognition Of Our Religious Heritage And Religious Life.

The focus of the constitutional era was not the eradication of religion from public life, or even its mere toleration

in public and private life. Instead, it was to ensure that religious values be allowed free exercise without compelling exercise contrary to conscience. As Justice Joseph Story noted, the intent of the revolutionary government in relation to the framing of the First Amendment of the Constitution was to allow freedom of religious expression:

> The real object of the First Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion which had been trampled upon almost from the days of the Apostles to the present age. . . .

2 J. Story, *Commentaries on the Constitution of the United States* § 1847, at 593 (2d ed. 1851). Thus, the religion clauses were designed to prohibit the exclusive advancement of any Christian denomination by forbidding exclusive privileges to any one sect. This intent in the framing of the First Amendment was an indicator of the positive sentiment in the revolutionary era for free religious expression. Religion, by virtue of history and tradition, was so enmeshed in American culture that the Establishment Clause could not, even if that were the desired result, entirely sever government from religion.[1] In the words of the late Judge Charles Fahy, "[t]he climate

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[1] As Justice Jackson stated in *McCollum* v. *Bd. of Ed.*, 333 U.S. 203, 236 (1948), "The fact is that for good or ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity . . . and other faiths. . . ."

of the American revolutionary period, including the period of constitutional development, was fundamentally religious." Fahy, *Religion, Education and the Supreme Court*, 14 Law & Contemporary Problems 73, 77 (1949).

Not only were the Framers of the Constitution concerned that religious expression, freedom and education be accommodated, they saw it as vital to the health of the nation. This was most clearly demonstrated in the passage of the Northwest Ordinance of 1787 by a Congress composed of most of the drafters of the Constitution and First Amendment, and reenacted in 1789 by the same Congress that wrote the First Amendment. It reads,

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in said territory. Religion, morality, and knowledge being essential to good government and happiness of mankind, schools and the means of education shall forever be encouraged.

Ord. of 1787, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927). Private (mostly religious) schools were to be encouraged, as in the Northwest Ordinance, because they promoted "religion, morality, and knowledge."

Religious expression was also encouraged in the Continental Congress through a symbolic opening prayer delivered by a chaplain. 1 *Journals of the Continental Congress* 26 (Washington ed. 1828). Contrary to the assertion that the historical intent of the First Amendment was to secularize the nation (in the pursuit of freedom for all), many of the states participating in the Continental Congress had laws outlawing blasphemy of the deity. In 1788, Oliver Ellsworth of Connecticut, who

represented that state at the Constitutional Convention and the First Congress, and later became Chief Justice of the United States, wrote that civil authority has the right to pass laws against "blasphemy and professed atheism." *Essays on the Constitution of the United States* 171 (Ford ed. 1892). Also, as another example of the encouragement of symbolic expression during this period, most states from independence until the Bill of Rights encouraged wo: ship by observing a symbolic sabbath day in their Sunday closing laws. *See, e.g., Independent Chronicle of Boston* (Nov. 16 1780); *New Jersey Acts of 1790* (June 12, 1790).

Perhaps one of the most symbolic acts taken by the Continental Congress was in relation to the Bible. On September 12, 1782, the Continental Congress by formal resolution recommended for purchase the first edition of Scriptures by John Aitken. This was just five years after the Congress had recommended the importation of twenty thousand Bibles. J. Hall, *History of the Presbyterian Church in Trenton* 329 (1859).

Given the Framers' disposition toward religious expression, no matter the form, it is inconceivable that the removal of religious symbols from public forums in present-day America would fulfill their intentions.

B. The Historical Context Of The Establishment Clause Supports Public Recognition Of Our Religious Heritage.

1. This Court Has Historically Held Governmental Involvement With Religious Expression To Be Constitutional.

In *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), this Court ruled against a party who desired to restrain the federal government from paying money to a Native American

tribe planning to use the funds for a Catholic school.[2] The Court held that the government was fulfilling its treaty obligations by acting essentially as a trustee over public funds for private disbursal. 210 U.S. at 80. Chief Justice Fuller affirmed the constitutionality of such practices by quoting directly from the decision of the lower court,

> The 'treaty' and 'trust' moneys are the only moneys that the Indians can lay claim to as a matter of right; the only sums on which they are entitled to rely as theirs for education; and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expanded for their benefit, and in part for their education; it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians, and such would be the effect of the construction for which the complaints contend.

210 U.S. at 81. The Catholic schools supported in *Quick Bear* were run by priests and nuns. Their symbolic frocks and habits, and the religious symbols which were affixed to the walls of the schools were explicitly religious, yet not constitutionally infirm. It is also evident from the quotation above that the congress as well as this Court were aware of the symbolic importance of such funding.

By Act of Congress of August 7, 1864, $30,000 was appropriated for the construction of additions to a sectarian hospital ("Providence" hospital) in the District of Columbia. 13 Stat. 43 (1864). While addressing the constitutionality of such an appropriation, this Court in *Bradfield* v. *Roberts* 175 U.S. 291, 298 (1899), acknowledged

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[2] Earlier financial support of religion among Native Americans is summarized in Section B(5) herein.

that the Roman Catholic church exercised a "great and perhaps controlling influence over the management of the hospital." Despite the religious symbols that doubtlessly adorned the hospital and their inherent religiousity, this Court found that the hospital's overriding concern for care of the sick and infirm to be a sufficient secular purpose to withstand scrutiny under the First Amendment. 175 U.S. at 299-300.

In *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), this Court held that an act of Congress, which was designed to curtail the burgeoning influx of unskilled labor immigrants, was not applicable to a contract between a church and an English minister working in the United States. In holding that the statute was inapplicable to a pastor, Justice Brewer wrote for the Court that America "is a religious nation" and then noted several forms of symbolic religious expression which had historically been held to be constitutional:

> If we pass upon these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day. . .

143 U.S. at 471. Religious symbolism and other forms of public religious expression are part of the national heritage. Such expression cannot now be declared unconstitutional because of the desires of a few to level out the

national landscape to a secular common denominator. This was not the intent of the Framers, nor in the present day is it the desire of the American people.[3]

2. This Nation's Presidents Have Approved The Constitutionality Of Symbolic Religious Acts And Proclamations, Which This Court Has Upheld.

Both before and after the drafting and enactment of the First Amendment, governmental acknowledgment of a Supreme Being was a naturally accepted feature of American public life. The Framers of the Constitution and government officials invoked the name of God, asked his blessings upon our Nation, and encouraged our people to do the same. The Framers actively participated in official governmental action sanctioning religious symbols and activities having a far less incidental religious effect than the mere display of a creche, Christmas tree, or menorah.

In September 1774, the delegates of the first session of the Continental Congress resolved on the second day of proceedings to open the next day's meeting with a prayer by an invited clergyman. 1 *Journals of the Continental Congress* 26 (1774) After a few selected appointments to the position of congressional chaplain, the Continental Congress decided that chaplains should be elected

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[3] As this Court stated regarding such symbolic religious expression in *Engel* v. *Vitale*, 370 U.S. 421, 435 n.21 (1962),

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.

annually. 27 *Journals of the Continental Congress* 683 (1784).

When George Washington was inaugurated as our first President, he went, accompanied by both Houses of Congress, to St. Paul's Chapel in New York City for a concluding divine service conducted by the first Episcopal Bishop of New York. *See*, A. Stokes & L. Pfeffer, *Church and State in the United States* 87 (rev. 1st ed. 1964). The decision to hold the service was the product of a joint resolution adopted by both houses of Congress. *Ibid.* Similarly, the First Congress, which drafted and adopted the First Amendment, simultaneously retained chaplains to offer public prayers at the beginning of each legislative day. 1 *Journal of the Senate*, 1st Cong., 1st Sess. 10 (1789); 1 *Journal of the House of Representatives*, 1st Cong., 1st Sess. 11-12 (1789); Act of September 22, 1789, ch. 17, Section 4, 1 *Stat.* 71 (1789); *see also Marsh* v. *Chambers*, 463 U.S. 783 (1983).

Symbolic proclamations were issued by various presidents for thanksgiving, prayer, and fasting. These symbolic presidential declarations were fraught with religious reference and held more symbolic sway and import with the country at that time than any religious symbol sitting on the sidewalk may have today. Congress first proposed a joint resolution on September 24, 1789, which was intended to allow the people of the United States an opportunity to thank "Almighty God" for His many blessings on the American people. This proclamation was submitted to the president the very day after the Congress had voted to recommend to the states the final text of what was to become the First Amendment to the Constitution.

A portion of President Washington's Proclamation for a National Thanksgiving on October 3, 1789, illustrates the figurative religious importance of the occasion:

> Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor; and
>
> Whereas both Houses of Congress have, by their joint committee, requested me "to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness:"
>
> Now therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of this country previous to becoming a nation. . .

1 *Messages and Papers of the Presidents* 56 (J. Richardson ed. 1897) (hereinafter cited as J. Richardson). The peoples' reaction to presidential proclamations of this type was not minimal. John Adams described one such fasting day proclamation to his wife Abigail Adams:

> We have appointed a Continental fast. Millions will be upon their Knees at once before their Great Creator, imploring His Forgiveness and blessing: His smiles on American Councils and arms.

A. Stokes & L. Pfeffer, *supra* at 83. The desired effect of these symbolic proclamations then was plainly not mere commemoration of an event, but to encourage the general populace (if they were so religiously inclined) to enter into

a religious observance.[4] President John Adams' Proclamation of March 2, 1799, just after the ratification of the Establishment Clause, was unequivocal in its intent to evoke a response from the American people, stating in part,

> For these reasons I have thought proper to recommend, and I do hereby recommend accordingly, that Thursday, the 25th day of April next, be observed throughout the United States of America as a day of solemn humiliation, fasting, and prayer; that the citizens on that day abstain as far as may be from their secular occupations, devote the time to the sacred duties of religion in public and in private; that they call to mind our numerous offenses against the Most High God, confess them before Him with sincerest penitence, implore his pardoning mercy, through the Great Mediator and Redeemer, for our past transgressions, and that through the grace of His Holy Spirit we may be disposed and enabled to yield a more suitable obedience to His righteous requisitions in time to come. . . .

1 J. Richardson, *supra* at 275. John Adams issued at least two additional Thanksgiving proclamations and James

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[4] State authorities were equally agreeable to proclaiming days of prayer, fast, and thanksgiving. John Jay (the first Chief Justice of this Court) as Governor of New York deemed it proper and constitutional to appoint a day of thanksgiving, requesting the people to show "national gratitude and obedience to the Supreme Ruler of all nations" on November 26, 1795. W. Jay, 1 *Life of John Jay* 385-386 (New York 1833). Governor Richard Howell of New Jersey proclaimed the same day one of thanksgiving and recommended its observance to the citizenry. "As Reasonable creatures, we are bound to acknowledge our Dependence upon God . . . [and] entertain a reasonable hope that God in His Providence will continue His many Favors." New Jersey State Gazette (Nov. 24 1795).

Madison issued at least four. *See* 1 J. Richardson, *supra* at 284-286, 513, 532-533, 558, 560-561.

Although the tradition of issuing such proclamations subsided for a period,[5] President Abraham Lincoln revived the Thanksgiving holiday stating,

> Now, therefore, in compliance with the request, and fully concurring in the views of the Senate, I do by this proclamation designate and set apart Thursday, the 30th day of April 1863, as a day of national humiliation, fasting, and prayer. And I do hereby request all people to abstain on that day from their ordinary secular pursuits, and to unite at their several places of public worship and their respective homes in keeping that day holy to the Lord and devoted to the humble discharge of the religious duties proper to that solemn occasion.

6 J. Richardson, *supra* at 164-165 (1897).

This Court's "Establishment Clause precedents have recognized the special relevance in this area of Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 777 n.33 (1973), quoting

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[5] Thomas Jefferson thought such proclamations would violate the Constitution and did not issue any. *See*, A. Stokes & L. Pfeffer, *supra*, at 88. Nonetheless, President Jefferson later encouraged the establishment of denominational schools of religion on or adjacent to the public University of Virginia campus which would "offer the . . . advantage of enabling the students of the University to attend religious exercises . . . ." 19 Writings of Thomas Jefferson 415 (Mem. ed. 1904). Jefferson also wrote: "And can the liberties of a Nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?" W. Berns, The First Amendment and the Future of American Democracy 13-14 (1976); *Illinois ex. rel. McCollum* v. *Board of Education*, 33 U.S 203, 246-247 (1948) (Reed, J., dissenting).

New York Trust Co. v. *Eisner*, 256 U.S. 345, 349 (1921). The Court has steadfastly "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970). The historical objective since the inception of this country has been not only an accommodation of religious expression, but its active symbolic use by even the highest office in the land.

3. The Intent Of The First Amendment Was To Encourage Freedom For Religious Expression, And Not Censor Public Recognition Of Our Religious Heritage.

Far from silencing religious influences in society, the Framers saw no contradiction in "no law respecting an establishment of religion" and governmental encouragement of religion. The Framers did not intend to expunge religious influence from society or even foster a climate of detached neutrality towards religion.

In the opening speech of the debate in the First Congress which considered the proposed religion clauses, Peter Sylvester of New York expressed the fear that the Establishment Clause "might be thought to have a tendency to abolish religion altogether." 1 J. Gales, *The Debates and Proceedings in the Congress of the United States*, 729 (1834). More than one author has asserted that the chief sponsor of the First Amendment, James Madison, sought to allay the fears of Sylvester and other representatives by assuring them that among the most important purposes of the First Amendment was the advancement of the interests of religion. *The Garden and the Wilderness* 4 (M. Howe ed. 1965); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 6-11 (1978).

The purpose of the religion clauses was not freedom from religious symbols and other expression, but freedom *for* religious symbols and expression. Kirven, *Freedom of Religion or Freedom from Religion?*, 48 American Bar Association Journal 816 (1962). As James Madison himself observed, "There is not a shadow of right in the general [federal] government to intermeddle with religion. . . . This subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it." 5 *The Writings of James Madison* 176 (G. Hunt ed. 1904).

In summary, Judge Thomas Cooley noted in this regard,

> It was never intended that by the Constitution the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects. The Christian religion has always been recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.

T. Cooley, *The General Principles of Constitutional Law in the United States of America* 205-206 (1880).

4. The State Constitutions At The Time Of The Framing Of The First Amendment Encouraged Religious Expression.

The desire to foster religious expression in public areas by the Framers of the Constitution can also be seen in the

context of each of the constituent states to the union. An inspection of the religion clauses in the state constitutions which were in effect during the period from 1789 to 1825 discloses that the people of not a single state desired an "absolute wall of separation." C. Antieau, A. Downey & E. Roberts, *Freedom from Federal Establishment* 161 (1964).[6] Instead, each state's constitutions publicly acknowledged the deity, often along with other symbolic references to our religious heritage.

The first senators and representatives doubtless were familiar with their respective state constitutions at the time of the framing of the First Amendment. There was no greater symbolic representation of a state's basis of government than its constitution. In every state constitution in force between 1776 and 1789 where "establishment" was mentioned it was equated to or used in conjunction with "preference." *See, e.g.*, F. Thorpe, 5 *The Federal and State Constitutions* 2597, 2635-2636, 2793, 3100 (1909).[7] As the Delaware Constitution of 1776 stated,

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[6] This book, which is cited extensively in this Brief and is the source of much of the information contained herein, was cited with approval by this Court in *Walz* v. *Tax Commission*, 397 U.S. 664, 675 n. 3 (1970).

[7] This Court in *Holy Trinity Church* v. *United States*, 143 U.S. 457, 468 (1892), stated,

> If we examine the constitutions of the various states we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. This recognition may be in the preamble, such as found in the Constitution of Illinois, 1870: "We the people of the State of Illinois, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations," etc.

"there shall be no establishment of any one religious sect in this State in preference to another." C. Antieau et al., *supra* at 133. The basic concern was not religious expression by any single group in a pluralistic society, but that the state might only allow a single religious group to express itself in preference to others.

Some of the state constitutions during 1789-1825 also specifically incorporated the desires of the citizenry that religious expression be financially aided by the state, which is not only symbolic but fiscal recognition as well. For example, the Massachusetts Constitution of 1780, which prevailed until 1833, provided:

> As the happiness of a people, and the good order and preservation of civil government essentially depend upon piety, religion and morality . . . the legislature shall from time to time authorize and require the several towns and parishes . . . to make suitable provision, at their own expense for the institution of the public worship of God.

The Maryland Declaration of Rights of 1776 empowered the Legislature to "lay a general and equal tax, for the support of the Christian religion." 3 F. Thorpe, *supra* at 1688. The people of Georgia in their 1789 Constitution provided: "No one religious society shall ever be established in this State, in preference to another. . . ." *Id.* at 801. They did not find it inconsistent to add financial support for religious symbols in a subsequent section,

> The arts and sciences shall be promoted, in one or more seminaries of learning; and the legislature shall, as soon as conveniently may be, give such further donations and privileges to those already established as may be necessary to secure the objects of their institution.

Id. at 801.

This Court has often indicated that contemporary state constitutions are relevant in construing the Untied States Constitution. It is important to note that under most of the state constitutions it was legally proper for the state to aid religion and religious education symbolically and even financially in the period immediately following ratification of the Bill of Rights.

5. The Grant Of Funds, Stipends, And Public Lands To Religious Organizations Indicates An Encouragement Of Public Religious Symbols And Expression Rather Than A Suppression Of Them.

As the states, the federal government itself was willing to recognize symbolically and even to aid financially religion and religious education in many ways. No hostility to either religious institutions or any of the symbolic expressions of their faith was ever displayed.

Congress, in the early years of our national existence, frequently made grants of land to educational institutions, both public and private. D. Hill & W. Fisher, *Federal Relation to Education* 23-24 (1931); E. Reisner, *Nationalism and Education Since 1789* 342-343 (1922). The Seventh Congress set aside a township of land in 1803 in the Ohio Territory "for the purpose of establishing an academy," and there was no limitation upon the sponsorship of such academy. 2 Stat. 226 (1803). The grant of land for schools without restriction that the school be nonsectarian was followed by the Eighth Congress in 1804 for the Indiana Territory, *id.* at 279. Similar unrestricted grants for religious and other schools were made by the Eleventh Congress in 1811 for the Louisiana Territory, *id.* at 621, and by the Fifteenth Congress in 1818 for the Territory of Michigan. 3 Stat. 430 (1818). In the Alabama Territory a township was reserved in 1818 by the same Congress "for the support of a seminary of learning," *id.*

at 467, and a township was set aside by the Nineteenth Congress for the same purpose in the Florida Territory. 4 Stat. 201 (1827).

The understanding that the First Amendment did not prevent federal governmental grants to church-related educational institutions is vividly shown by unrestricted grants of land "to the amount of twenty-five thousand dollars" each to two denominational institutions in the District of Columbia: Columbian College (religious) in 1832 and Georgetown College (Roman Catholic) the following year. 4 Stat. 603-604 (1832); 6 Stat. 538 (1833). Furthermore, Congress was willing during the first year of national life to reserve and appropriate land for the encouragement of religion, and there is no reason to believe that the members of Congress deemed such aid inappropriate.[8] In 1787 the Congress had granted land to the Ohio Company, reserving various plots "for the encouragement of religion." 1 Stat. 257 (1787). While it is true that President Madison vetoed an 1811 bill providing for a grant of land to a Baptist church in Salem, Mississippi, Congress obviously had concluded to the contrary that the bill was constitutional. 8 *Writings of James Madison* 133 (Hunt ed. 1904).

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[8] This is distinctly shown by the large number of states which accepted as proper the grant of public lands to religious institutions. For example, a number of religiously owned academies in Massachusetts were given such assistance in the period from 1780 to 1800. S. Smith, The Relation of the State to Religious Education in Massachusetts 114 (1926). In 1790 the New York Legislature gave Columbia College and a number of academies public lands. C. Mahoney, The Relation of the State to Religious Education in Early New York, 1633-1825, 92 (1941). In the southern states the people were equally in agreement that granting state lands to religious organizations was desirable. *See, e.g.*, 5 South Carolina Statutes 357 (1799).

Congress following the ratification of the First Amendment not only granted public lands, but used public funds to further exposure to religion. In 1803, for example, President Thomas Jefferson requested and received ratification from the Senate for a treaty with the Kaskaskia Indians. This treaty provided:

> And whereas the greater part of said tribe have been baptized and received into the Catholic Church, to which they are much attached, the United States will give annually, for seven years, one hundred dollars towards the *support of a priest of that religion*, who will engage to perform for such tribe the duties of his office, and also to instruct as many of their children as possible, in the rudiments of literature, and the United States will further give the sum of three hundred dollars, *to assist said tribe in the erection of a church.*

W. Sweet, *Religion in the Development of American Culture 1765-1840* 242 (1952). The Jefferson administration made similar appropriations in at least two other treaties with Native American tribes. "Treaty with the Wyandots, etc.," 7 Stat. 88 (1805); "Treaty with the Cherokees," *id.* at 102.

Again, in March of 1819, the Congress indicated that it considered that it was proper and constitutional to appropriate $10,000 to be given to the mission boards of many denominations for work among various tribes. R. Beaver, *Church, State and the Indians*, 4 Journal of Church and State 23-24 (1962). John C. Calhoun, as Secretary of War from 1817 to 1825, gave mission societies thousands of dollars to Christianize and educate Native Americans. Edwards, *A Problem of Church and State in the 1870's* 11 Mississippi Valley Historical Review 39 (1924). The use of Land Statutes and federal funds to proselytize the Native

American population continued until the turn of the last century. As one author has observed:

> by 1896, Congress was appropriating annually over $500,000 in support of sectarian Indian education carried on by religious organizations. This expenditure of public money appropriated by Act of Congress for over a century following the ratification of the First Amendment constitutes absolute proof that for over a century neither Congress nor the religious leaders interpreted the First Amendment to mean a prohibition of the use of public funds by Congress in aid of religion and religious education.

J. O'Neill, *Religion and Education Under the Constitution* 30-33 (1949). By subsidizing various missionary works among the Native American tribes, Congress not only took symbolic acts recognizing the religious element in society, but gave its symbolic imprimatur to religious expression. It therefore cannot now be said that much lesser symbolic religious representations by private parties in public forums represent a violation of the First Amendment.

C. The Symbolic Focal Point Of The Country, This Nation's Capitol, Has A Myriad Of Religious References Throughout Its Historic Sights.

The word "symbolism" by its very definition is the "practice of representing things by means of symbols or of attributing symbolic meanings to objects, events, or relationships." *The American Heritage Dictionary* 1231 (2d ed. 1985). The Argument put forth by the Respondents in this case is that the Christmas tree, the creche, and the menorah are symbolic of underlying religious themes or messages and therefore this public display violates the Establishment Clause.

If these objects are violative, then so are many of the symbolic edifices standing in the nation's Capitol which honor the great achievements and leaders of this country. Millions of people from across the country and around the world have viewed these distinguished buildings and monuments and have been moved by them. Those memorials inscribed with religious scriptures or religious observations hold more religious importance and are more likely to proselytize the viewers than the three symbols currently under dispute before the Court.

The Jefferson Monument not only honors the figure of President Thomas Jefferson, but it extols his writings as well. One wall of the Jefferson Monument enshrines the first portion of the Declaration of Independence, proclaiming it "self evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ." On another wall of the same monument is a quote from the Virginia Statute for Religious Freedom, stating in part that "Almighty God hath created the mind free, and manifested his supreme will that free it shall remain of all attempts to influence it by temporal punishments or burthens . . . are a departure from the Holy Author of our religion . . . ." *See*, M. Murdock, *Your Memorials in Washington* at 142-145 (1952).

Perhaps the greatest symbol of our democracy at work is the Capitol building. In the Capitol Building a room was specially set aside by the 83rd Congress in 1954 for prayer for members of the Senate and House of Representatives. In the center of the room is a stained glass panel of President George Washington kneeling in prayer with the first verse of Psalm 16 etched in the glass below him as follows.

> Preserve me, O God; for in
> thee do I put my trust.

The Statuary Hall in the Capitol building, originally the House of Representatives' chamber, contains statutes of ministers and Christians of historical importance from almost every state of the Union. In addition to this, an inscription in golden letters is engraved over the Speaker's rostrum in the House of Representatives stating this Country's national motto, "In God We Trust."

Another important institution, the Library of Congress, features other symbolic expressions of our religious heritage. Of all the important pieces of literature which could be exhibited from the archives of the world's largest library, it is one of the remaining Guttenburg Bibles which sits in prominent display. In the main reading room of the library symbolic figures adorn the uppermost portions of the walls. Over the figure of religion is a quote from the Bible, "[w]hat doth the Lord require of thee but to do justly to love mercy and to walk humbly with thy God." (Micah 6:8) Above the figure of science is the phrase, "The Heavens Declare the glory of God and the firmament show his handiwork." (Psalm 19:1) H. Small, *The Library of Congress: Its Architecture and Decoration* 92 (1982).

The Lincoln Memorial has inscribed on one of its walls the Gettysburg Address, which contains the words "This Nation Under God." Murdock *supra* at 109. The Washington Monument, dominating the landscape of the Nation's Capitol and venerating the Father of our Country, is constructed of Memorial Blocks contributed by individuals, churches, and associations throughout the United States extolling the virtues of God and His blessings upon the Nation. Inscribed in Latin on the very tip of the Monument are the words "Praise be to God." *See generally,* R. Zapp, *The Washington Monument* (1900).

Last but not least is this Supreme Court, whose opening invocation asks God to bless its affairs. *Guide to the United States Supreme Court* 27 (1979). Attorneys admitted to the Supreme Court bar take the oath of admission with their hands figuratively placed on the Bible held out by the Clerk. The oath contains the phrase, "so help me God." Directly above where the Justices sit in session, carved in relief in the very stone of the building is a representation of Moses in the form of the "majesty of the law" and the Ten Commandments. *Guide to the United States Supreme Court* 4 (1979).

These national symbols have an inherent religious theme, but they have an historical one as well. The constitutionality of such displays can only be determined in the context of their historical tradition or their commemorative nature.

For example, since the context is the basis of a symbol's meaning, in the present case it would be as arbitrary to isolate the creche from the entire city celebration as to isolate the individual items in the creche from each other. Alone, the manger or a figurine of a sheep or king has no religious significance. Each item's meaning is gained through an integration with the other components of the display; their meaning is in their context. The same is true of trying to discover the meaning of Allegheny County's Christmas display of which the creche is a part, or of the City's entire seasonal celebration, of which the display is a part.

Attempting to extract secular meanings from memorials or displays which have religious connotations in order to justify their constitutionality is an unnecessary exercise in legal circumlocution. The tradition, historical context, and commemorative nature of the displays are all

that need be examined in order to justify their constitutionality. Just as our national motto is part of the historical make-up of our society, the display during the winter holidays of the menorah, creche, and Christmas tree is inextricably rooted into our national heritage. Not only do the displays symbolize a time of celebration, but they symbolize the basis of those holidays as well. To declare these displays unconstitutional because of an underlying religious theme compels the conclusion that each of the aforementioned national monuments is also in contempt of the Constitution.

CONCLUSION

Absolute prohibition of any religious expression which may be linked even incidentally to the public domain is the ultimate goal of the Respondents in this case. Such an object flies in the face of constitutional intent, history, and this Court's clear precedent.

Obdurate application of the Establishment Clause to any expression or symbol which may have a religious connotation to it would invariably lead to censorship of every aspect of our religious heritage. Justice Douglas foresaw this possibility in *Zorach* v. *Clauson*, when he stated,

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for a wide variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it

> follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . .

343 U.S. 313-314. The Establishment Clause has never required government to exclude religion in an unyielding manner from our public occasions and institutions.[9] Allowing such symbolic acts as the Postmaster General placing the image of the Madonna on a commemorative stamp at Christmas time,[10] and permitting the singing of Christmas carols or the portrayal of the First Christmas in school programs,[11] shows that traditional acknowledgements of the religious elements of our heritage fit comfortably within the zone of permissible governmental interaction with religion.

This Court has always recognized the constitutionality of acknowledging our religious heritage. Religious sym-

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[9] This can be seen in the manner which this Court has acknowledged the right to community groups to display such religious symbols. *See, e.g., Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973) (the maintenance of an illuminated granite monolith on which the Ten Commandments were inscribed together with other symbols involved a primarily secular rather than religious purpose); *Paul* v. *Dade County*, 202 So.2d 833 (Fla. Ct. App.), *cert. denied* (1968), (a fifty foot cross located on public fair grounds was held not violative of a state constitutional provision prohibiting aid to religious institutions).

[10] *Protestants and Other Americans United for Separation of Church and State* v. *O'brien*, 272 F. Supp. 712 (D.D.C. 1967).

[11] *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980).

bols and their inter-relationship with the government are not an historical anomaly, and remain in present-day America as historical evidence of constitutional intent. Whether the observer wishes to construe these actions as symbolic vestiges of a religious past or as a symbol of a thriving religious present, the fact is that they remain. Other examples of this current religious symbolism are oaths of allegiance for government and court officers;[12] a national anthem containing a statement of religious belief (in the last verse of the "Star Spangled Banner" is the phrase, "And this be our motto 'In God is our Trust.'"); a national motto ("In God We Trust") displayed on all United States coins and currency;[13] a Pledge of Allegiance that recognizes religious heritage;[14] a national day of prayer;[15] and customary court oaths and judicial protocol. The fact that these symbols and symbolic acts continue to be so widespread throughout our government illustrates the historic affinity between constitutional principles and symbolic expression.

To find that the display of the menorah, creche, or Christmas tree violates the First Amendment is to find these more explicit expressions listed above (and others discussed earlier) to be constitutionally infirm. The Framers never intended to eradicate public display of religious symbols. Nor did they envision that one day their carefully constructed Constitution would be used as a sweeping scythe, indiscriminately cutting away the display of the articles of their faith in the name of liberty.

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[12] U.S. Constitution Article VI; *Engle* v. *Vitale*, 370 U.S. 421, 466 n.3 (1962).

[13] 31 U.S.C. § 324 (1976).

[14] 36 U.S.C. § 172 (1982).

[15] 36 U.S.C. § 169h (1982).

The decision of the Court of Appeals flagrantly conflicts with this Court's clear precedent, with the intentions of the Framers of the First Amendment and with the history of the Republic. Therefore, it is vital that this dispute be resolved in favor of the petitioners.

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